



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 209 OF 2013

MARGARET W. MWAURA.....1ST PLAINTIFF

JOSEPH NG'ANG'A KAMAU.....2ND PLAINTIFF

PETER NJOROGE KAMAU.....3RD PLAINTIFF

VERSUS

PAUL NYARA NG'ANG'A.....DEFENDANT

JUDGMENT

Margaret W. Mwaura, Joseph Ng'ang'a Kamau, Peter Njoroge Kamau, (hereinafter referred to as plaintiffs) have sued Paul Nyoro Ng'ang'a claiming that at all material times to this suit the plaintiffs were/are the joint registered owners of that parcel of land known as **L. R. NO. UASIN GISHU/KONDOO/183** measuring 3.4 Hectares (hereafter referred to as the suit land).

Further, to paragraph 3 above, the Plaintiffs aver that they became joint registered owners of the suit land pursuant to a court order dated 4.12.2002, which order was issued in ELDORET SUCCESSION CAUSE NO. 6 OF 1983 IN THE MATTER OF THE ESTATE OF THE LATE KAMAU NG'ANG'A'S (DECEASED) and in which order the title deed which had been issued to Paul Nyoro Ng'ang'a was cancelled and in its place a title deed dated 11.10.2005 was issued to the plaintiffs.

The Plaintiffs contend that the Defendant has continued to illegally and wrongfully trespass and cultivate and generally interfere with the suit land to the detriment and prejudice of the plaintiff. The defendant has been persistently trespassing onto and cultivating the suit land without the permission or authority of the plaintiffs who are the registered owners and therefore depriving, frustrating and obstructing the plaintiffs of occupation, possession and use of the land.

The defendants are being alleged to be disregarding and or disrespecting a valid and binding Court Order. Being guilty of unlawful deprivation of property and or land grabbing. Denying or depriving the plaintiffs of the expected earnings/mesne profits accruable from the suit land for a period of over twenty (20) years. Being actuated by greed and intent to unfairly enriching himself. Refusing to vacate from the suit land. Being actuated by ulterior motive, ill will arid bad faith. By reason of the defendant's illegal actions, the Plaintiffs have been exposed to immense hardships, injury and irreparable loss and damage.

The plaintiffs state that whereas they had filed an application dated 24.04.2012 in the aforesaid Succession Cause No. 6 of 1983, however, in its Ruling dated 11th June, 2012, the court while declining the same inter alia observed that the plaintiffs have rights as proprietors of the suit land which rights may be enforced by the plaintiffs in their own right by way of an ordinary suit. The Honourable Court also observed that the dispute therein (in the said application) was purely between registered proprietors (being the plaintiffs herein) and a trespasser (being the Defendant herein). It was not therefore a dispute in the administration of the Estate of the late KAMAU NG'ANG'A (Deceased).

The Plaintiffs aver that this cause of action belongs to them and that there is no other suit pending and (save for the application and the Ruling alluded to in paragraph 8 above) there are no previous proceedings in any other court between the parties herein over the same subject matter herein. The cause of action arose within the jurisdiction of this honourable court.

(a) The plaintiffs therefore claim as against the Defendant is an order for mandatory injunction to compel the Defendant to forthwith vacate from the suit land parcel number UASIN GISHU/KONDOO/183 and to demolish any structures that he has constructed thereon and to remove any materials, debris and or livestock therefrom at his own cost and in default the Defendant to be forcefully evicted from the suit land. General and aggravated damages for illegal trespass, occupation and cultivation thereof plus nominal damages in lieu of lost mesne profits.

The defendant filed statement of defence and counterclaim denying that the Plaintiffs were/are and the joint registered owners of that parcel of land known as L. R. NO. UASIN GISHU/KONDOO/183 measuring 3.4 Hectares (hereinafter referred to as the suit property).

The Defendant denies that the Plaintiffs became joint registered owners of the suit property pursuant to a court order dated 4th December, 2002 and also denies that the order was issued in Eldoret the Succession Cause No. 6 of 1993 in the matter of the estate of the late Kimani Ng'ang'a (deceased).

In light of the above denial, the Defendant denies that the order alleged at paragraph 4 of the Plaintiff cancelled the title deed issued to the Plaintiff's in respect of the suit property. The Defendant shall put the Plaintiffs to strict proof of the facts pleaded in paragraph 4 of the Plaintiff.

The Defendant denies that has continued to illegally and wrongfully trespass and cultivate and generally interfere with the suit land to the detriment and prejudice of the Plaintiff's having made this denial, the Defendant denies the particulars of illegality pleaded at paragraph 5 of the Plaintiff as hereunder;

(a) That he has persistently trespassed into and cultivating the suit land without the permission or authority of the Plaintiffs who are the registered owners.

(b) That he has deprived, frustrated and obstructed the Plaintiffs of occupation, possession and use of the land.

(c) That has disregarded and or disrespected a valid and binding court order. The Plaintiffs have not stated which court order they are referring to.

(d) That he is guilty of unlawful deprivation of property and of land grabbing. This is a serious allegation on the part of the Plaintiffs which implies that the Defendant has been convicted of such allegations in criminal case yet the same is not true.

(e) That he has been denying the Plaintiffs of the expected earnings/maize profits accruable from the suit property for a period of over twenty (20) years.

(f) That he is actuated by greed ad intent to unfairly enrich himself.

(g) That he has refused to vacate from the suit land. He shall be demonstrated hereunder. The Defendant has a right of remaining on the suit land.

(h) Being actuated by ulterior motive, ill will and bad faith.

Arising from the above foregoing denials, the Defendant denies any illegal actions on his part, and states that if the Plaintiffs are suffering any immense hardships, injury and irreparable loss and damage as pleaded at paragraph 6 of the Plaintiff, the same are not attributable him but the circumstance in which he occupied and possessed the suit property.

In the counter claim, the defendant states that the Defendant (now his deceased brother namely Kamau Ng'ang'a was allotted suit property by the land Adjudication Settlement Department sometime in the late years of 1960s.

The Defendant's deceased brother having been allotted the suit property at the time aforesaid, he died on the 23rd day of March 1970. This was before the lands Adjudication and Settlement Department confirmed the allocations of the suit property to him.

The Lands Adjudication and Settlement Department however later confirmed allocation of the suit property to the Defendant's deceased brother and by the time the confirmation was done the allottee was already dead.

Despite the death of the defendant's brother the suit land remained in the name of the deceased in the documents of the relevant government land agencies and departments.

Prior to his death, the Defendant's deceased brother was married to the 1st Plaintiff (now Defendant) and had bigotted with her the 2nd and 3rd Plaintiff (also now Defendants).

However long before his death, the Defendant's deceased brother had separated with the 1st Plaintiff who had deserted him carrying with her the 2nd and 3rd Plaintiffs who were then very young children.

The Defendant's family did not ever hear any more about the Plaintiffs until sometimes later.

Arising from the foregoing facts, the Defendant states that he took it upon himself, to pay the relevant money required by the Settlement Fund Trustee so that the suit property could be discharged and transferred into his name.

The Defendant did pay the above stated money in full until it became necessary to obtain the discharge and transfer of the suit property to himself from the Settlement Fund Trustees.

The above could not happen as the documents held by the Settlement Funds Trustees reflected that the land was allotted the Defendant's deceased brother who had died even before the confirmation of the allocation of the suit property to himself.

For the above reason, it became necessary to obtain letters of administration intestate in respect of the Defendant's deceased brother, so that

the Settlement Fund Trustee could transfer the suit property into the Defendant's name.

The letters of administration intestate were obtained by the Defendant and pursuant thereto, the Settlement Fund Trustee transferred and discharged the suit property in favour of the Defendant. A title deed was accordingly issued to the Defendant.

Sometime in the year 1997, the Plaintiff's appeared having been joined into the succession cause of the Defendant's deceased brother estate. The succession cause was culminated to the title deed issued to the Defendant being canceled and instead a new title being issued to the Plaintiffs.

Further to the foregoing reasons, the Defendant states that while the suit property is registered in the name of the Plaintiffs, they so hold the suit property in trust for him. The particulars leading to a constructive trust are described in the counter claim.

For the above reason, the Defendant states that he has been in peaceful occupation of the suit property (save for interludes of post-elections violence) for over 40 years. He has no other place known to him where he can settle and make a living therefrom other than from the suit property.

The defendant in the counterclaim prays for orders that:

(a) Declaration that the defendant (now plaintiff) has a beneficial interest over the suit property and thus his occupation and use of the same is not illegal.

(b) A declaration by this honourable court to the effect that while the plaintiffs are the registered owners of the suit property, they hold the same in trust of the defendant (now plaintiff).

(c) Without prejudice to the above, in the alternative in the interest of justice (Equity) given the circumstances of this case, an order to the effect that the suit land be shared equally between the plaintiffs (now defendants) and the defendant (now plaintiff).

In the reply to defense and defense to counterclaim, the plaintiff reiterates the averment in the plaint and further states that the counterclaim is incompetent, fatally defective, bad in law and an abuse of court process. Further to the matters contained in paragraph 5 above, the plaintiffs contend that the allegations contained in the defendant's counterclaim are res judicata having been fully heard and adjudicated upon in the Probate and Administration Succession Cause No. 6 of 1983 – In the matter of the Estate of Kamau Ng'ang'a and hence the defendant's allegations are of no legal consequence.

Further to the foregoing, the plaintiffs shall contend that the allegations contained in the defendant's counterclaim are a furtherance of the defendant's ulterior and fraudulent motive of depriving the plaintiffs of their property through unconstitutional, illegal, surreptitious and unorthodox means.

The plaintiffs reiterate that the illegal and fraudulent title deed which had been issued to the defendant in respect of the suit land herein pursuant to the confirmation of Grant of Letters of Administration issued on 4th November, 1991 and which had been annulled and revoked was cancelled by the High Court vide the court order dated 4th February, 2002.

It is pursuant to the cancellation of the illegal and fraudulent title document aforesaid that the plaintiffs were issued with a title deed dated 11th October, 2005 in respect of the suit land number Uasin Gishu/Kondoo/183. Consequently, the plaintiffs are the legitimate and *bona fide* proprietors of the suit land to the exclusion of all other persons including the defendant herein.

The defendant's attempts to challenge the High Court order in the Court of Appeal failed. It is patently clear that the defendant's counterclaim is a clandestine and unprocedural attempt to challenge a High Court order which has already been effected/executed through the backdoor which is untenable in law.

The plaintiffs reiterate that the defendant continued occupation of the suit land is illegal, fraudulent and an annulity as pleaded and particularized under paragraph 5 of the Plaintiff.

The plaintiffs categorically deny being trustees of the defendant as alleged or at all. The plaintiffs reiterate that the defendant has absolutely no iota of a claim, interest or right over the suit land. The defendant nonetheless is invited to strict proof to the contrary. The plaintiffs therefore contend that the defendant is not entitled to the relieves pleaded in the counterclaim and in particular;

(a) It is denied that the defendant has a beneficial interest or at all over the suit property.

(b) The plaintiffs reiterate that the defendant's occupation and use of the suit property is illegal and exploitative as the defendant is actuated by greed and self-aggrandizement to the detriment and prejudice on the part of the plaintiffs.

(c) The plaintiffs deny that they hold the title deed in trust of the defendant and the alleged particulars of the purported constructive trust are of no legal consequence or effect.

(d) Accordingly, the defendant's plea that the suit property be shared equally between the plaintiffs and the defendant is fraudulent, baseless, unreasonable and completely misplaced. The plea is clearly intended to unfairly and unjustly enrich the defendant.

The plaintiffs contend that the defendant's defence and counterclaim is a sham, incompetent and amounts to an abuse of the due process.

In their evidence, the PW1 Margaret Wanjiku Mwaura testified that they are the Plaintiffs herein having instituted this suit as against PAUL NYORO NG'ANG'A, the Defendant herein over that parcel of land known as UASIN GISHU/KONDOO/183 (hereafter referred to as the suit land). That they are the joint registered proprietors of the suit land having been issued with a Title Deed thereof on 11th October, 2005. The suit land measures 3.4 Hectares. That they became joint registered owners of the suit land pursuant to a court order dated 4th February, 2002 which was issued in ELDORET HC SUCCESSION CAUSE NO. 6 OF 1983 - IN THE MATTER OF THE ESTATE OF THE LATE KAMAU NG'ANG'A (DECEASED) and in which order the Title Deed which had been issued to PAUL NYORO NG'ANG'A was cancelled and in its place, they were issued with a title deed dated 11.10.2005.

That it is within their knowledge that the Defendant's attempts to appeal against the Ruling/Order aforesaid was unfruitful. That whereas, the Defendant is aware of their registration as owners of the suit land however he has continued to unlawfully and wrongfully trespass, occupy and cultivate on their land.

That the Defendant also had unlawfully and wrongfully constructed some structures on their land and also keeps livestock thereon.

That at no time did they allow, authorize or permit the Defendant to ingress, cultivate, occupy rear livestock and or in any other manner to deal and or interfere with their parcel of land and as such the Defendant's actions are illegal, wrongful, null and void ab initio.

That the Defendant has and continues to deprive, frustrate and obstruct them from occupying and cultivating their parcel of land for a period of over twenty (20) years thereby denying them the expected income and or mesne profits accruable or earnable thereto and they hereby seek for compensation by way of nominal damages in lieu thereof as against the Defendant.

That the Defendant's actions have denied them access to their own parcel of land hence violated their constitutionally espoused rights to use, cultivate and utilize their land as they wish which is tantamount to unlawful deprivation of property and 'land grabbing'. They therefore seek for general and aggravated damages under this limb as against the Defendant.

That any further trespass and or activities on their land by the Defendant will result in gross miscarriage of justice and they accordingly seek for a mandatory injunction to compel the Defendant to forthwith vacate from the suit land and to demolish all structures that he has constructed thereon and to remove any materials, debris and or livestock therefrom at his own cost. That consequently, they should be accorded quiet, peaceful and vacant possession of the suit land.

That they hereby reiterate all the averments as pleaded in the plaint drawn and filed by M/s J. N. Njuguna & Company Advocates for and on our behalf.

That they are aware that whereas an application dated 24th April, 2012 which had been filed vide ELDORET HC SUCCESSION CAUSE NO. 6 OF 1983 was declined by this Honourable Court vide a Ruling dated 11th June, 2012, nonetheless wherein the Court inter alia made a finding that they have rights as proprietors of the suit land which rights may be enforced by them by way of an ordinary suit. The court also observed that the dispute in the said application was purely between registered proprietors (ourselves) and the Respondent (Defendant) as a trespasser. It was therefore not a dispute in the administration of the estate of the late KAMAU NG'ANG'A (Deceased).

It is for the foregoing reasons that they have instituted the instant suit. They reiterate all the averments as pleaded in the plaint.

PW2, Dorcas Cheptoo Ngalamoi testified that there was succession cause number 6 of 1983 wherein the deceased was Kamau Ng'ang'a and the petitioner is Paul Nyoro Ng'ang'a. Margaret Wanjiku Mwaura was the objector. She produced the file as an exhibit.

PW3 was Dorothy Chepkoei Leting. The County Land Registrar, Uasin Gishu as she then was. She produced the certified copy of the green card. The green card showed that the land belonged to Settlement Fund Trustees and on 2.3.2000, it was transferred to Paul Nyoro Ng'ang'a and title deed issued. On 10.4.2000, a caution was entered by Joseph Ng'ang'a Kamau on behalf of others claiming interest as beneficiary. On 27.1.2003, a withdrawal of caution was registered. On 27.1.2003, an order was registered ordering entry No. 2 to be cancelled vide Succession Cause Number 6 of 1983. The title was transferred to Margaret Wanjiku Mwaura, Joseph Ng'ang'a Kamau and Peter Njoroge Kamau.

DW1, Paul Nyoro Ng'ang'a states that Kamau Ng'ang'a was his elder brother. He died on 23.3.1970. The parcel of land had not been given to the deceased. The land was registered in the name of the deceased because the same had been allocated to the deceased and states that if he had not processed the title in his name, the same could have been tedious.

The defendant paid for the land using his money. In November 1999, he paid for the title using his money of Kshs.10,000. He paid a further Kshs.551. In 2000, he paid Kshs.1,265 and was given the title deed. He has been paying rates.

The brother was alcoholic but was killed by an unknown person. He has been on the land for 47 years. When his brother died, he did succession and was given the grant which was confirmed and title to the suit land was registered in his name after transaction. However, the grant was challenged through an objection and the title was cancelled and registered in the names of the plaintiffs.

DW2, states that the defendant was a brother to Paul N. Kamau Ng'ang'a who was killed by a neighbor in 1969. When he died, his wife went away before the land was registered. The defendant took over possession and has been in possession since then.

The plaintiff submits that the issue of ownership of the suit property is res-judicata, Succession Cause No. 6 of 1983 having been determined.

The plaintiffs further submit that they are entitled to orders sought of eviction pursuant to the provisions of section 24, 25 and 26 of the Land Registration Act.

Moreover, that they are entitled to mesne profits.

The defendant on his part submits that the counterclaim is not res-judicata as the High court with the permission of the succession case could not make a declaration that the defendant was a trespasser. Moreover, that the High Court in the succession cause could not make a finding on trust. Moreover, that the High Court on annulment of the grant did not make a finding on the issue of trust. The defendant submits that he is entitled to the parcel of land by virtue of trust.

I have considered the pleadings, evidence on record and submission and I do find the fact of this case as follows thus, the suit land was allocated to Kamau Ng'ang'a, a brother to the defendant sometimes in the late year of 1960. Kamau Ng'ang'a died on the 23.3.1970. When he died, he had not received his allotment letter of the suit property from Settlement Fund Trustees.

The deceased's wife and children appear to have left immediately upon his death as there is no evidence of any eviction of the plaintiffs by the defendant.

The defendant took up the process of acquisition of the suit property from the Settlement Fund Trustees and successfully caused it to be registered in his brother's name despite the fact that his brother was deceased. The defendant filed a succession cause number 6 of 1983 and caused the land to be transferred in his name and title deed issued. The plaintiff successfully challenged the issuance of title through an objection.

The plaintiffs are now the registered proprietors of the suit land and therefore

Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: -

"The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

The registration of the plaintiffs as proprietors of the suit land, gives the plaintiffs absolute proprietorship for the said parcel of land. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) "The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject:

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

The plaintiff's complaint is that the defendant has trespassed on the suitland. The plaintiffs have produced the title deed duly registered as evidence of ownership and in terms of Section 26 (1) of the Act;

"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer, or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The plaintiffs are the registered owners of the suit land and therefore have an indefeasible right over the property. The plaintiffs' rights as proprietors of the land is clearly protected in law and the defendant has no reason to trespass thereon and the law allows the plaintiff to challenge the Defendant's ownership on grounds of illegality, unprocedural acquisition or corrupt scheme.

However, Equity abhors, unjust enrichment of anybody. The plaintiffs' husband and father died before procuring the title to the suit property. He had not paid a single cent though he had been allocated the land by Settlement Fund Trustees. After the demise of Kamau Ng'ang'a, the plaintiffs went away in 1970 only to resurface in 30.10.1997. 27 years after her husband's death. By the time the plaintiff resurfaces to claim the property, the defendant had processed the title to the property and the same was registered in the defendant's name.

On objection, the High Court in Succession Cause No. 6 of 1983 ordered the property to be registered in the plaintiff's name.

I do find that though the property was registered in the plaintiff's name, the defendant had acquired beneficial interest in the property having paid all the requisite fees and having caused the same to be registered in the names of Kamau Ng'ang'a. Moreover, paying all the requisite

fees and paying consideration in respect of the property created a resulting trust to the benefit of the defendant.

This court finds that the doctrine of res-judicata does not apply as the issue of trust was not before the High Court in Succession Cause No. 6 of 1983 and therefore, was not determined.

I do find that the defendant has proved on a balance of probabilities that there exist a resulting trust and therefore, do order that the plaintiffs be awarded ½ share of the suit property and the remaining half to be awarded to the defendant. No orders as to costs. It is so ordered.

Dated and delivered at Eldoret this 30th day of May, 2019.

A. OMBWAYO

JUDGE